SUPREME COURT, U. S.

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FILED
DEC 18 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 829

AETNA CASUALTY AND SURETY COMPANY, et al.,

Petitioners,

vs.

OSBORNE-McMILLAN ELEVATOR COMPANY, INC., a corporation,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

A. For Purposes of This Petition Respondent Concedes That The Law of a Sister State as Expressed in an Opinion of The Highest Court of Such Sister State is Entitled to Full Faith And Credit For Its Decisional Effect as Well as For Its Res Judicata Effect.

Respondent concedes for purposes of this petition, that the law of a sister state as expressed in an opinion of the highest court of such sister state is entitled, under Article IV, Section 1 of the Constitution of the United States, to full faith and credit for its decisional effect (as well as for its res judicata effect) in a proceeding in a forum of another state in which the law of the sister state is applicable under applicable choice of law rules. Respondent further concedes, as did the Wisconsin supreme court, that the decisional law of Minnesota as represented by *Honeymead Products Co. v. Aetna Casualty and Surety Co.*, 275 Minn. 182, 146 N.W. 2d 522 (1966), was applicable on the second appeal to the Wisconsin supreme court to determine whether an explosion had occurred within the meaning of the insurance policies in question. However, for reasons developed subsequently, it is Respondent's position that there is no full faith and credit question before this Court.

B. The Wisconsin Supreme Court Did Not Reach or Decide The Federal Question And Its Decision Was Correctly Based on The Independent Ground That Substantive Minnesota Law, as Announced in The *Honeymead* Case, Was Consistent With The Wisconsin Court's Decision in The First Appeal.

The basis for the Petitioners being before this Court is their contention that the Wisconsin supreme court decided that the Minnesota decisional law was not entitled to full faith and credit. Since the full faith and credit question was never discussed in the Wisconsin court's opinion, the Petitioners attempt to cross this threshold question by arguing that the federal question was decided by the Wisconsin court's denial of their motion for rehearing. Actually, it is clear from a reading of the Wisconsin court's opinion the review of which is now being sought that the full faith and credit question was not considered because it was not reached. The Wisconsin supreme court assumed the applicability of Minnesota decisional law as expressed in the *Honeymead* case, considered Petitioners' contentions as to its meaning, concluded that Minnesota law was the same as the Wisconsin law, and affirmed the judgment of the trial court. There was no reason to consider the full faith and credit question even if it had been raised by the insurance companies.

It is well settled that this Court will decline to review state court judgments which rest on independent and adequate state grounds even where federal questions are involved and have been properly and timely raised. *Henry v. State of Mississippi*, 379 U.S. 443, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965), *rehearing denied* 380 U.S.

926, 85 S. Ct. 878, 13 L. Ed. 2d 813 (1965); *Wolfe v. State of North Carolina,* 364 U.S. 177, 80 S. Ct. 1482, 4 L. Ed. 2d 1650 (1960), *rehearing denied* 364 U.S. 856, 81 S. Ct. 29, 65 L. Ed. 2d 808; *Radio Station WOW v. Johnson,* 326 U.S. 120, 65 S. Ct. 1475, 89 L. Ed. 2092 (1945).

It also has been held that the refusal of a state court to grant a petition for rehearing which raises a federal question does not constitute a judicial determination of the federal question. *Consolidated Turnpike v. Norfolk and Ocean View Railway Company,* 228 U.S. 326, 33 S. Ct. 510, 57 L. Ed. 857 (1913).

C. Assuming For The Sake of Argument That The Wisconsin Court Did Misinterpret Minnesota Decisional Law as Expressed in The *Honeymead* Case, Such Misinterpretation Did Not Constitute a Denial of Full Faith And Credit.

There is no question here but that the Wisconsin court found Minnesota law as represented by the *Honeymead* case to be applicable, that it attempted to interpret the meaning of the *Honeymead* case and that it did apply such Minnesota law to the facts of the case. There was no refusal on the part of the Wisconsin court to apply Minnesota law. This much was conceded by the Petitioners in their brief submitted to the Wisconsin supreme court in support of their motion for rehearing; at page 3 (Appendix pp. 44-45) they said:

> "Therefore, we respectfully contend that this court mistakenly interpreting Minnesota law as not requiring that the increase of internal force be a sudden increase, has reached a holding patently contrary to the governing Minnesota law."

This Court has consistently held that the misconstruction or misapplication of the statute law of one state by the courts of another state, as distinguished from the failure to construe or apply the sister state's laws altogether, is not a denial of full faith and credit. See *Western Indemnity Co. v. Rupp,* 235 U.S. 261, 275, 35 S. Ct. 37, 41, 59 L. Ed. 220, 225 (1914), where it is said:

> "It is earnestly argued that the [Kentucky] court erred in its construction of the Illinois statute. We do not pass upon this question, deeming it to be outside of the limits of our jurisdiction; for it is settled that where in a state court the validity of an act of the legislature of another State is not in question, and the controversy turns merely upon its interpretation or construction, no question arises under the 'full faith and credit' clause of the Federal Constitution."

To the same effect are *Allen v. Allegheny Co.,* 196 U.S. 458, 25 S. Ct. 311, 49 L. Ed. 551 (1905); *Johnson v. New York Life Insurance Company,* 187 U.S. 491, 23 S. Ct. 194, 47 L. Ed. 273 (1903); *Banholzer v. New York Life Insurance Company,* 178 U.S. 402, 20 S. Ct. 972, 44 L. Ed. 1124 (1900); *Lloyd v. Matthews,* 155 U.S. 222, 15 S. Ct. 70, 39 L. Ed. 128 (1894); *Glenn v. Garth,* 147 U.S. 360, 13 S. Ct. 350, 37 L. Ed. 203 (1893). There would appear to be no reason why the rule applicable to the construction of sister-state case law would be any different from that relating to the construction of sister-state statutes.

In an attempt to avoid the inevitable consequences of the rule that mere misinterpretation or misconstruction of the law of a sister state is not a denial of full faith and credit, the Petitioners have devoted much of their statement of the case and some of their argument to development of the proposition that the Wisconsin court, in its opinion on the second appeal, played mere lip service

to its decision in the first appeal and to the *Honeymead* case and, in effect, denied their validity. In seeking to substantiate this extreme position upon which their contention of denial of full faith and credit is bottomed, they have taken liberties with the opinions of the Wisconsin supreme court which should not be allowed to pass unnoticed. The Wisconsin court's discussion of the meaning of the *Honeymead* case and of its earlier decision in the face of the same contentions now being made by the Petitioners is eminently sound and can stand on its own two feet. Nevertheless, a brief statement of the parties' contentions and the Wisconsin court's disposition of them may be helpful to a full understanding of the Petitioners' present posture before this Court.

The case involves simply the question whether the bursting apart of a steel storage tank containing grain caused by additional stresses being imposed on the walls as a result of the contraction of the steel walls of the tank around the grain during a sudden drop in temperature can amount to an explosion. The Wisconsin supreme court decided on the first appeal that the mere suddenness, speed and violence of the tank's disruption — standing alone — was not enough to constitute an explosion and said that a necessary element was the presence of an active force causing an increase in the pressure against the inside of the tank walls, but added that such increase need not be "unusual, abnormal or suddenly produced." (Appendix p. 21). It remanded the case for a new trial under new instructions since it found there was conflicting evidence as to whether grain, when compressed, had the ability to push back with an increased force. On the insurance companies' appeal to the Wisconsin supreme court after the second trial, they contended essentially that it was necessary that the active force causing

the increase in internal pressure be suddenly produced. It was in answer to such contention that the Wisconsin supreme court said that the element of suddenness related to the release of pressure rather than to its creation. This was absolutely consistent with the clear language of its opinion in the first appeal. The assertions in Petitioners' brief to the effect that under the second opinion of the Wisconsin court every occurrence which involves a sudden release of pressure would be an explosion is patently incorrect since it ignores the clear holding that an increase in internal pressure is a necessary element of an explosion. Similarly, if Petitioners' placement in quotation marks of the phrase "release no matter how caused" on page 10 of their brief is intended to denote that such language was taken from the Wisconsin court's opinion in the second case it is an outright misrepresentation as the opinion of the Wisconsin court contains no such language — even by implication.

Petitioners' attempt to find the *Honeymead* case as a departure from the Wisconsin court's opinion in the first appeal is no more persuasive than their attempt to find the Wisconsin court's opinion in the second appeal to be a departure from its opinion in the first appeal. The *Honeymead* case involved the splitting open of a steel storage tank containing soybean oil in a liquid state during a sudden drop of temperature. The Minnesota court sustained the verdict that the event did not constitute an explosion because, citing and quoting extensively from the Wisconsin court's opinion in the first appeal of this case, there was no increase in the internal pressure because oil, unlike wheat, was not capable of resisting the tank's contraction but merely rose inside the tank. This feature of the case was found by the Minnesota court to be a decisive distinction from the

present case — not an immaterial distinction. Since in the *Honeymead* case there was no increase in internal pressure whatsoever — much less any sudden increase thereof — the question was not raised or argued, and the Wisconsin court regarded statements of the Minnesota supreme court containing the phrase "sudden or violent increase of pressure" and the like as mere dictum not essential to the decision. At no point in the *Honeymead* opinion is the statement made that a sudden increase in pressure is a necessary element of an explosion. The Minnesota court's reference to sudden increase in pressure can be regarded as no more than an expression of the qualities of some types of explosions, especially in view of its reliance on the opinion of the Wisconsin court in the first appeal where it is explicitly stated that the increased pressure necessary to constitute an explosion need not be suddenly produced.

The lower courts of Nebraska and Kansas which are not bound by either Wisconsin or Minnesota law, when confronted by facts essentially identical to those in this case and having the benefit of both opinions of the Wisconsin court as well as that of the Minnesota court in the *Honeymead* case (Appendix pp. 46-56), had no difficulty in finding that explosions had occurred. Like the Wisconsin court, these courts apparently have seen no discrepancies among the holdings of the cases.

It is apparent from this that the Wisconsin court correctly decided that the *Honeymead* case did not depart from the holding of the Wisconsin court in the first appeal and that Petitioners' position that the Wisconsin court denied the validity of either its opinion in the first appeal or the *Honeymead* case finds no support. In any event, it is clear that a misinterpretation of applicable

Minnesota decisional law would not be a denial of full faith and credit.

D. Petitioners Did Not Raise The Federal Question Sought to be Reviewed in a Timely Manner.

Under 12 U.S.C. §1257(3) in order to be entitled to review by writ of certiorari, the federal question sought to be reviewed must have been "specially set up or claimed under the Constitution", and under Supreme Court Rule 23-1(f) the petition must show that the federal question was "timely and properly raised".

It is undisputed that Petitioners raised no federal question until June 27, 1967, when they served their motion for rehearing of the Wisconsin supreme court's decision that had been announced on June 9, 1967. The motion merely asserted that:

> "1. This Court, in its opinion of June 9, 1967, failed to give full faith and credit to the law of Minnesota, as recently determined in *Honeymead Products Co., Inc. v. Aetna Casualty and Surety Co., et al.,* which law, concededly, governed the resolution of the issue here, and that by so failing to give full faith and credit to the governing law of a sister state, this Court has deprived petitioners of rights guaranteed by the United States Constitution, Section 1, Article IV."

This contention was scarcely developed in Petitioners' brief in support of their motion for rehearing where the contention was merely repeated, supported by the following argument at page 4 of their brief (Appendix p. 45):

> "The law is so familiar and well settled to the effect that a court of one state must give full faith and credit to both the statutory and substantive law of a

sister state that no citation of authority is required here."

In view of Petitioners' argument here that this Court has never decided the very question which they represented to the Wisconsin supreme court as being so "well settled" as to require the citation of no authority, there is a substantial question whether a federal question raised in so casual and perfunctory a manner in the state court proceedings has really been raised at all. *Cf. Hulbert v. Chicago,* 202 U.S. 275, 26 S. Ct. 617, 50 L. Ed. 1026 (1906).

At the time of the submission of briefs on the insurance companies' second appeal to the Wisconsin supreme court, the *Honeymead* case had been decided by the Minnesota supreme court. The insurers urged at that time that Minnesota law, as expressed in the *Honeymead* case, was applicable in the Wisconsin supreme court on the second appeal but also argued that the *Honeymead* case and the Wisconsin court's opinion on the first appeal in the *Osborne-McMillan* case were entirely consistent. Although we can agree that such opinions were entirely consistent but not in the way suggested by the insurance companies, it was perfectly plain that if the Wisconsin court agreed with the insurers' interpretation of the *Honeymead* case but disagreed with their interpretation of the opinion in the first Wisconsin appeal there would be a question as to the applicable law both under the doctrine of law of the case (*i.e.,* the binding effect of the decision in the first appeal) and under the full faith and credit clause of the Constitution. The insurance companies chose not to address themselves to either question in their main brief or in their reply brief, although the former point had been raised in the elevator company's brief under "Questions Involved" and was discussed at pages 17 and

18 of the brief. Instead, the insurance companies limited their argument to the point that the Wisconsin court's opinion in the first appeal and the decision of the Minnesota court in the *Honeymead* case were consistent with each other. The Petitioners' excuse for the failure to raise the federal question at the time of the submission of the case to the Wisconsin supreme court is the alleged "diametric shift in focus of definition". For reasons stated under the preceding point, it is clear beyond cavil that the Wisconsin court's opinions in the two appeals are completely consistent with each other and that the insurers could have anticipated that if their interpretation of the *Honeymead* case had been accepted by the Wisconsin court in the second appeal the question of the full faith and credit to be afforded the Minnesota decision would be reached. Nevertheless, they failed to raise the question even by implication.

It is clear that a federal question raised for the first time on petition for rehearing comes too late in the proceedings to have been timely raised. See *Consolidated Turnpike v. Norfolk and Ocean View Railway Company,* 228 U.S. 326, 334, 33 S. Ct. 510, 513, 57 L. Ed. 857, 862 (1913):

> "Nothing is better settled than that it is too late to raise a Federal question for the first time in a petition for rehearing, after the final judgment of the state court of last resort."

This rule has been applied consistently by this Court. See: *Hanson v. Denckla,* 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958); *Radio Station WOW v. Johnson,* 326 U.S. 120, 65 S. Ct. 1475, 89 L. Ed. 2092 (1945); *Herndon v. Georgia,* 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935); *McGarrity v. Delaware River Bridge Commission,* 292 U.S. 19, 54 S. Ct. 565, 78 L. Ed. 1095

(1934); *American Surety Co. v. Baldwin,* 287 U.S. 156, 53 S. Ct. 98, 77 L. Ed. 231 (1932); *Godchaux Company, Inc. v. Estopinal,* 251 U.S. 179, 40 S. Ct. 116, 64 L. Ed. 213 (1919); *McMillen v. Ferrum Mining Company,* 197 U.S. 343, 25 S. Ct. 533, 49 L. Ed. 784 (1905); *Susquehanna Boom Company v. West Branch Boom Company,* 110 U.S. 57, 3 S. Ct. 438, 28 L. Ed. 69 (1883).

Petitioners seek to avoid the consequences of their failure to raise the federal question prior to the motion for rehearing by invoking the "surprise doctrine". Since, as pointed out before, Petitioners reasonably could have anticipated the existence of a full faith and credit question if the Wisconsin court had accepted their interpretation of the *Honeymead* case, the "surprise doctrine" cases upon which they rely provide no support for their contention that the raising of the federal question on their motion for rehearing was timely. The cases cited by Petitioners all involved situations markedly distinct from that presented here in that in those cases either the decision of the state supreme court could not have been reasonably anticipated or the presence of a federal question was speculative until the state supreme court had made its decision. As is pointed out in Wolfson & Kurland, *Robertson and Kirkman—Jurisdiction of the Supreme Court of the United States,* p. 131 (1951), cited by the Petitioners, ". . . the rule of the 'surprise' cases may not successfully be invoked to excuse the failure to raise the federal question prior to Petition for Rehearing if it appears that prior decisions of the state court foreshadowed the ruling complained of."

It is apparent that Petitioners should reasonably have anticipated the existence of the federal question if the Wisconsin supreme court had accepted their interpreta-

tion of the *Honeymead* opinion. Since the question was not raised until the motion for rehearing, it is clear that the question was raised too late to warrant its consideration by this Court.

E. There Are No Special or Important Reasons Why Review on Writ of Certiorari Should be Granted.

Rule 19-1 of the Rules of the Supreme Court specify that review by writ of certiorari "will be granted only where there are special and important reasons therefor." In *Rice v. Sioux City Cemetery,* 349 U.S. 70, 74, 75 S. Ct. 614, 616, 99 L. Ed. 897, 901 (1955), the type of important matter which warranted review by writ of certiorari was discussed, *viz.*:

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . .'Special and important reasons' imply a reach to a problem beyond the academic or episodic."

The insurance companies urge that it is important that insurance policies covering multi-state risks be governed by the same substantive law. A measure of the importance which the Petitioners actually assign to such question can be ascertained from the policy which they issue in this case. It was the standard form of Minnesota fire policy which insured Respondent's grain stocks located in five states. Yet, the policy drafted by the insurers contained no provision specifying that the substantive law of a particular state would govern the construction of the contract. Moreover, at the first trial of this case, the in-

surers argued that Wisconsin substantive law was applicable and that argument was made notwithstanding that grain stocks covered by the same policy were located in four other states. The brief submitted to the Circuit Court of Douglas County by the insurers in June of 1962 reads in part (p. 4):

> "The policies of insurance upon which suit is brought are Wisconsin contracts and have been prescribed, issued and countersigned in Wisconsin. All questions of construction of the policies must be decided in accordance with the laws of Wisconsin."

The insurance company Petitioners by their own conduct in writing the policy and in urging the application of the law of the state of Wisconsin have foreclosed themselves from now making any serious contention that the question raised is an important one. If the Petitioners are now faced with "disastrous uncertainty", as they contend, the situation is one of their own making and can easily be remedied. To invoke the protection of a great constitutional principle to extracate themselves from such a situation seems singularly inappropriate.

CONCLUSION

For the reasons stated, the Petitioners are not entitled to review of the decision of the Wisconsin supreme court by writ of certiorari for four reasons all of which are independent of each other, *viz.*:

1. The federal question was not decided by the Wisconsin court because its decision was based upon a correct interpretation of Minnesota substantive law.

2. If the Wisconsin court's decision was based upon a misinterpretation of Minnesota substantive law as distinguished from a refusal to apply it, such misinterpretation is not a denial of full faith and credit.

3. If a full faith and credit question was presented, it was raised, if at all, too late in the proceedings before the Wisconsin court to be considered timely by this Court.

4. If the full faith and credit question was timely and properly raised, still there is no special or important reason why review of the question should be granted.

II. THE COURT, IN THE EXERCISE OF ITS DISCRETION, SHOULD AWARD RESPONDENT DAMAGES UNDER SUPREME COURT RULE 56-4.

Rule 56-4 of the Supreme Court provides:

> "Where a petition for writ of certiorari has been filed, and there appears to be no ground for granting such a writ, the court may, in appropriate cases, adjudge to the respondent reasonable damages for his delay."

This rule should be read in conjunction with Rule 56-2 of the Supreme Court which provides:

> "In all cases where an appeal delays proceedings on the judgment of the lower court, and appears to have been sued out merely for delay, damages at a rate not exceeding 10 per cent., in addition to interest, may be awarded upon the amount of the judgment."

There are many reported decisions in which damages have been awarded under these rules. *Bohn v. Bohn,* 316 U.S. 646, 62 S. Ct. 1279, 86 L. Ed. 1730 (1942); *Slaker v. O'Connor,* 278 U.S. 188, 49 S. Ct. 178, 73 L. Ed. 258 (1928); *Wagner Electric Manufacturing Company v. Lyndon,* 262 U.S. 226, 43 S. Ct. 589, 67 L. Ed. 961 (1923); *Southern Railway Co. v. Gadd,* 233 U.S. 572, 34 S. Ct. 696, 58 L. Ed. 1099 (1914); *Texas & P. R.*

Co. v. Prater, 229 U.S. 177, 33 S. Ct. 637, 57 L. Ed. 1139 (1913); *Deming v. Carlisle Packing Co.,* 226 U.S. 102, 33 S. Ct. 80, 57 L. Ed. 140 (1912); *Nelson v. Flint,* 166 U.S. 276, 17 S. Ct. 576, 41 L. Ed. 1002 (1897); *Gregory Consolidated Mining Co. v. Starr,* 141 U.S. 222, 11 S. Ct. 914, 35 L. Ed. 715 (1891); *Whitney v. Cook,* 99 U.S. 607, 25 L. Ed. 446 (1878); *Hall v. Jordan,* 86 U.S. 271, 19 Wall. 271, 22 L. Ed. 47 (1873); *Prentice v. Pickersgill,* 73 U.S. 511, 6 Wall. 511, 18 L. Ed. 790 (1867); *Salton v. Bancroft,* 64 U.S. 320, 23 How. 320, 16 L. Ed. 454 (1860); *Kilbourne v. St. Louis State Savings Institute,* 63 U.S. 503, 22 How. 503, 16 L. Ed. 370 (1860); *Barrow v. Hill,* 54 U.S. 53, 13 How. 54, 14 L. Ed. 48 (1851). We respectfully ask that the Court give consideration to the award to Respondent of substantial damages in this case for the following reasons:

1. The petition is singularly devoid of merit and is an example of the same kind of second guessing, changing positions, misstatements and delay to which the insured has been subjected since the commencement of litigation in April of 1962.

2. The petition seems to have been filed as much for the collateral advantages it may have in delaying final resolution of the similar cases pending throughout the country in which the insurers are involved as for any serious attempt to seek review of the Wisconsin decision.

3. The Wisconsin judgment has borne interest at the rate of 5% since the date of the verdict in the second trial, September 16, 1965, which is substantially lower than the almost unprecedented high interest rates of modern times which prevailed during much of the period of the appeal and petition to this Court.

4. Frivolous petitions to this Court should be discouraged and the practice of insurance companies in penaliz-

ing successful litigants against them by forcing extraordinary legal expenses upon them by prolonging litigation should not be condoned. See *Whitney v. Cook*, 99 U.S. 607, 25 L. Ed. 446 (1878), where it is said:

> "Our experience teaches that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages, and we think this is a proper case in which to say that hereafter more attention will be given to that subject, and the rule enforced both according to its letter and spirit. Parties should not be subjected to the delay of proceedings for review in this court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked."

5. The Petitioners in this case, a group of 44 large insurance companies, can split up the expenses of litigation whereas the Respondent, a relatively small grain company, has no one with which to share its expenses.

6. The Petitioners-insurance companies have behaved in an exceedingly high-handed manner, perhaps best typified by (a) their starting a declaratory judgment action in Wisconsin before notifying the insured of the rejection of its claim receipt of which notification was a prerequisite to the insured's institution of its own action and (b) then obtaining a Wisconsin court injunction preventing the prosecution of the insured's Minnesota suit which was started several days after institution of the insurers' Wisconsin action.

CONCLUSION

For reasons herein stated, the Respondent urges that the petition be denied and, since there are no grounds for granting the writ, that Respondent be awarded dam-

ages against Petitioners for the delay in the amount of 10% of the judgment or $59,491.00.

Respectfully submitted,

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